APPEAL NO. 021373
FILED JULY 11, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 2, 2002. Because the date of the alleged injury was in dispute and respondent 1 (carrier 1) and respondent 2 (carrier 2) provided coverage to the employer during consecutive periods of time, there were two separate dockets, which were resolved with one decision and order. The hearing officer resolved the disputed issues by determining that the appellant (claimant) sustained an occupational disease injury; that the date of injury is _____; that the claimant failed to timely notify the employer of the injury and, consequently, carrier 1 and carrier 2 are relieved from liability and the injury is not compensable; that the claimant did not have disability; and that because carrier 2 owed no benefits, it is not liable for the payment of accrued benefits under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) which resulted from its failure to dispute the injury or initiate payment of benefits within seven days of receiving written notice of the claim. On appeal, the claimant expresses disagreement with the hearing officer's decision. Specifically, the claimant urges that the correct date of injury is _____, and that because she gave notice of injury to the employer within 30 days of that date, her injury is compensable, she had disability, and carrier 2 is liable for the payment of benefits resulting from its failure to dispute the injury or initiate payment of benefits within seven days of receiving written notice of the claim. Carrier 1 and carrier 2 both urge affirmance of the hearing officer's decision.

DECISION

Reversed and rendered in part, and reversed and remanded in part.

It is not disputed on appeal by either carrier that the claimant sustained an occupational disease in the course and scope of her employment with her employer. There are two carriers because the employer changed coverage from carrier 1 to carrier 2 on a date that the carriers believed was _____. We shall summarize the evidence underlying the issues under appeal.

The claimant said that she first noticed a problem in _____, described as pain in her hands every now and then but not on a daily basis. There were periods between episodes of pain when she would be pain free. The claimant said that she did not know that she had an injury or anything severe enough to prevent her from working. Sometimes, while at home, she noticed her hands felt numb. The pain and swelling was on and off in May, June, and July. However, the pain in her right hand began to hurt every day in October. The claimant said she reported the hand pain to her supervisor on _____, which was about two days after the pain had become continuous. Ergonomic studies of her workstation were then performed. On

_____, her supervisor noticed that her hands were swollen and told her to report this.

The claimant filled out an injury report on _____. She said that she was directed to put the date she first started having pain as the date of her injury, as near as she could remember. The claimant had at first written down _____ as the date of injury but then put _____, when urged to use the earliest date. As it turned out, this date was a Sunday, not a workday. The claimant said that on _____, she did not know what was causing her hand to hurt. However, she figured it was probably work related when her supervisor responded that he would ask for ergonomic studies. The claimant was sent to the company doctor on _____, and taken off work. The claimant said that the doctor gave her the first actual knowledge of how her work activities could cause her hand pain when he discussed this with her on that first visit. The claimant had not worked since this visit, and was terminated in February because the claim had been disputed and she could not qualify for a workers' compensation-related leave status. Prior to this, she was released to light duty at her insistence so her job would not be threatened.

When asked if her symptoms eased over the weekends when she was not working, the claimant said she could not recall. She did notice that when pain developed in her hand, it would be around lunchtime after working for a while. The claimant said that after carrier 1 denied the claim, she asked the adjuster why it was denied and was told that the basis was not reporting the injury within 30 days. She explained that she had been instructed to use the earliest date she felt pain, and the adjuster advised redoing the claim because there was a new carrier. A supervisor testified and disputed that the claimant was told to redo the claim, although she acknowledged that she and the claimant discussed doing this.

The claimant said that she had a different supervisor in May, June, and July, and had asked that supervisor if she recalled the claimant mentioning anything about her hands. That earlier supervisor could not recall any mention by the claimant of hand pain. The claimant's job changed in the summer months to involve more handwriting of answers to form questions instead of keyboarding.

There was not much in the way of testimony concerning dispute of the claim by carrier 2. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence was date-stamped as filed on January 29, 2002, but is dated December 11, 2001. The space to indicate when first written notice of injury was received is blank. Neither carrier 1 nor carrier 2 initiated benefits for either claimed date of injury.

DATE OF INJURY

Because the hearing officer has applied the wrong standard to ascertaining a date of injury as defined in Section 408.007, we reverse and render a new decision. In her findings of fact, the hearing officer found that the first day that the claimant began to notice "discomfort" and "occasional pain, swelling, and tingling" was

_____, and then concluded that this was the date of injury. The hearing officer then found that the claimant should have reported her "discomfort" to her employer within 30 days after this date. (Apparently, as this date is nowhere mentioned in the testimony, the hearing officer chose _____ because _____ was a Sunday.)

However, the 1989 Act requires the reporting of "injuries" to the employer, not mere discomfort or pain. The date of injury for an occupational disease is the date the employee knew or should have known that the disease may be related to the employment. Section 408.007. We have repeatedly cautioned that the date of injury for an occupational disease is not necessarily the date of the first symptom. Texas Workers' Compensation Commission Appeal No. 950028, decided February 16, 1995; Texas Workers' Compensation Commission Appeal No. 990089, decided March 1, 1999 (Unpublished). We have also declined to attribute medical knowledge to lay persons whose own treating physicians are in doubt about the nature of an injury or its causation. Texas Workers' Compensation Commission Appeal No. 941583, decided January 9, 1995; Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). Consequently, decisions finding a date of injury to be the same as the date of the first symptom have many times been found to be against the great weight and preponderance of the evidence, and manifestly unjust. *See, for example*, Appeal No. 990089, *supra*; Texas Workers' Compensation Commission Appeal No. 982944, decided January 22, 1999; Texas Workers' Compensation Commission Appeal No. 992486, decided December 29, 1999; Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994. It is reasonable prudence, not extraordinary prudence, that is the standard for determining when a person who did not actually know of a diagnosis should nevertheless have understood that there may be a work-related injury. There is no evidence to support a _____ date of injury, and the finding is therefore against the great weight and preponderance of the evidence. The claimant identified _____ (and the subsequent ergonomic study that was ordered by her supervisor), as giving rise to the idea that she had an injury and that it could be related to her work. We render a decision that the date of injury pursuant to Section 408.007 was _____, as supported by the great weight and preponderance of the evidence.

TIMELY NOTICE TO THE EMPLOYER

Section 409.001(a)(2) requires the employee to give notice to a supervisor of an occupational disease within 30 days of the date he or she knew, or should have known, that the injury may be related to employment. Accordingly, we reverse the determination that the claimant did not give timely notice of her injury and render a decision that timely notice was given within 30 days of _____.

DISABILITY

The hearing officer has found that due to right carpal tunnel syndrome, the claimant did not work or earn wages since _____. The reason for finding no disability had to do with the findings on date of injury and notice to the employer.

Accordingly, we render a decision, based upon the hearing officer's fact finding on inability to obtain and retain employment, that the claimant had disability beginning on _____, and continuing through the date of the CCH.

TIMELY DISPUTE BY THE SECOND CARRIER

Because the hearing officer did not find that the date of injury was when carrier 2 had coverage, she did not determine the timeliness of the TWCC-21, stating only that because carrier 2 was not liable, it had no obligation to file the TWCC-21. We remand for determination of the issues relating to filing of the TWCC-21 by carrier 2.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of carrier 1 is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

The true corporate name of carrier 2 is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert E. Lang
Appeals Panel
Manager/Judge